

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID WHITFIELD, :

4 Petitioner :

5 v. : No. 03-1293

6 UNITED STATES; :

7 and :

8 HAYWOOD EUDON HALL, AKA :

9 DON HALL, :

10 v. : No. 03-1294

11 UNITED STATES. :

12 - - - - -X

13 Washington, D.C.

14 Tuesday, November 30, 2004

15 The above-entitled matter came on for oral

16 argument before the Supreme Court of the United States at

17 10:09 a.m.

18 APPEARANCES:

19 SHARON C. SAMEK, ESQ., Tampa, Florida; on behalf of the

20 Petitioners.

21 JONATHAN L. MARCUS, ESQ., Assistant to the Solicitor

22 General, Department of Justice, Washington, D.C.; on

23 behalf of the Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

JUSTICE STEVENS: We'll now hear argument in Whitfield against the United States and Hall against the United States.

Ms. Samek.

ORAL ARGUMENT OF SHARON C. SAMEK

ON BEHALF OF THE PETITIONERS

MS. SAMEK: Justice Stevens, and may it please the Court:

Congress enacted 18 U.S.C. 1956(h) for the sole purpose of increasing the penalties for money laundering conspiracies.

Congress did not intend to abandon the overt act requirement from money laundering conspiracies and for good reason. The list of specified unlawful activities under 1956 is vast.

Anytime two or more people conspire or reach an agreement to commit a crime that generates economic proceeds, invariably the discussion will lead to what they're going to do with the money get -- that gets generated, how they're going to spend the money, which is a potential 1957 offense, or how they're going to hide the money, a potential 1956 offense. The Government would charge these agreements as money laundering conspiracies

1 without there even being a single overt act to demonstrate
2 that criminal intent had crystallized, that a money
3 laundering conspiracy was really afoot, and that steps
4 were being taken to launder money, oftentimes triggering
5 substantially higher penalties for the underlying offense,
6 and subverting -- subverting the overt act requirement for
7 conspiracy to commit the underlying offense.

8 JUSTICE STEVENS: Would you just clarify one
9 thing for me? Do they have to prove an overt act in order
10 to establish venue?

11 MS. SAMEK: Excuse me?

12 JUSTICE STEVENS: Does the Government have to
13 prove an overt act in order to establish venue?

14 MS. SAMEK: Our position is that the venue
15 provision in 1956(h) for money laundering conspiracies
16 requires that they establish an overt act and that venue
17 would lie --

18 JUSTICE STEVENS: Well, your -- you say the --
19 the statute requires. I'm just asking if it independently
20 of the conspiracy statute -- of the -- the substantive
21 statute itself, how do they establish venue. Do they have
22 to prove an overt act just for the purpose of getting a
23 venue established --

24 MS. SAMEK: Yes.

25 JUSTICE STEVENS: -- as they do --

1 JUSTICE SCALIA: Is that the only basis for
2 venue? I mean, I thought the statute provides that's just
3 one of the bases for venue.

4 MS. SAMEK: Our position is that the venue
5 provision in 1956, 1956(i), is the exclusive venue
6 provision for money laundering.

7 JUSTICE SCALIA: But -- but read it. What does
8 it say?

9 JUSTICE O'CONNOR: Are we talking about section
10 1956(i)?

11 MS. SAMEK: Section 1956(i) is the venue
12 provision.

13 JUSTICE O'CONNOR: And doesn't it allow it to be
14 brought where venue would lie if the completed money
15 laundering offense that's the object of the conspiracy has
16 been accomplished or anywhere an overt act was committed?
17 Isn't it an either/or?

18 MS. SAMEK: Yes. Our position is that when you
19 read the venue --

20 JUSTICE O'CONNOR: So you don't have to read it
21 as requiring venue. It's just requiring an overt act. If
22 there is an overt act, then venue will lie, but it also
23 will lie where the completed offense would have occurred.

24 MS. SAMEK: Certainly, but where the completed
25 offense occurs, there certainly would be overt acts. You

1 know, it's inherent in completing the money laundering
2 transaction that there would be overt acts as part of
3 the financial transaction.

4 JUSTICE STEVENS: But why would they state it in
5 the alternative if -- why would they state it in the
6 alternative if the overt act were always required? That's
7 the --

8 MS. SAMEK: I agree that it's -- it's somewhat
9 confusing, Your Honor, but we would submit that the
10 Government's interpretation of subclause (2) is that if
11 two people conspired in -- if two people in Florida
12 conspired to commit a money laundering offense in
13 California, absent any overt act whatsoever, conspiracy
14 would lay in California.

15 JUSTICE GINSBURG: But that doesn't respond to
16 the venue question. Venue, as written in this statute and
17 in most statutes, is permissive. It gives you a choice of
18 forum. It doesn't limit. In -- in the times when venue
19 is exclusive, Congress is explicit in telling you that,
20 but ordinarily a venue provision, as this one, either/or,
21 is permissive. It would be extraordinary to make a venue
22 provision exclusive.

23 MS. SAMEK: Well, this Court has made venue
24 provisions exclusive in the patent infringement context
25 and in the Banking Act precisely using the --

1 JUSTICE GINSBURG: Well, this Court has no
2 authority to make a venue provision either exclusive or
3 permissive. Congress decides that.

4 MS. SAMEK: And our position is that Congress
5 made this venue provision the exclusive venue provision --

6 JUSTICE SCALIA: I -- I mean, one can understand
7 that if the venue provision just read, a prosecution may
8 be brought in any -- in -- let's see -- may be brought in
9 the district where venue would lie for the completed -- if
10 it just read, venue will lie in any district where an act
11 in furtherance of the attempt or conspiracy took place,
12 then we could argue about whether that is the exclusive
13 venue or not.

14 But I don't see how there is even an argument
15 that it's the exclusive venue when you're dealing with a
16 provision which says that a prosecution may be brought in
17 the district where the -- where venue would lie for the
18 completed offense or in any other district where an act in
19 furtherance took place. How can you possibly read that to
20 say that the exclusive venue is a place where an act in
21 furtherance took place?

22 MS. SAMEK: Our position is that those are the
23 two alternatives for where venue would lie for a
24 conspiracy case.

25 JUSTICE SCALIA: Oh, okay, but -- but then --

1 then you acknowledge that the place where an overt act
2 took place is not the exclusive venue.

3 MS. SAMEK: Our argument is that the first
4 clause of that provision contemplates the existence of an
5 overt act.

6 JUSTICE GINSBURG: What about the rule provision
7 for venue, which has not been excluded by the statute?
8 The ordinary provision for venue.

9 MS. SAMEK: The ordinary provision for venue
10 would be that venue lies in the district where the crime
11 occurs.

12 JUSTICE GINSBURG: Yes.

13 MS. SAMEK: That would be -- in the money
14 laundering context, under our interpretation of 1956(h),
15 that would be where the overt act occurs. So it would be
16 consistent with it. Our --

17 JUSTICE GINSBURG: I thought the crime is the
18 conspiracy. The overt act may be an additional
19 requirement.

20 MS. SAMEK: The overt act is part of -- it's our
21 position that the overt act is required, and there needs
22 to be an agreement --

23 JUSTICE GINSBURG: But you will -- you will
24 concede that there are many Federal crimes, conspiracy
25 crimes, in which an overt act is not required. The

1 Shabani case requires you to recognize that.

2 MS. SAMEK: Correct. And in those cases where
3 all that's required is an agreement, then venue would lie
4 where the agreement occurs, but in this case, because the
5 -- the offense requires an agreement plus an overt act,
6 it's our position that that's where venue would lie.

7 As a practical matter, if there is -- if -- if
8 this Court construes 1956(h) as requiring overt act, as a
9 practical matter, anytime two people agree to commit a
10 money laundering conspiracy in one district and commit
11 overt acts in another district in furtherance of that, it
12 would be highly unlikely that there would not be some
13 overt act in the district where they agreed to commit the
14 offense.

15 JUSTICE GINSBURG: So you're saying that it
16 doesn't mean very much because an overt act wouldn't be
17 hard to prove.

18 MS. SAMEK: As a --

19 JUSTICE GINSBURG: But there are -- I mean, the
20 difference between statutes that say overt act is required
21 and those that just say conspiracy -- there are many, many
22 such statutes, and we dealt with one in Shabani. But of
23 all the statutes that include no express overt act
24 requirement, have any of them be read to implicitly
25 include one, which is the argument you're making that we

1 should adopt here?

2 MS. SAMEK: That's correct. And no. There --
3 we have not found any cases where the Court has heretofore
4 read an overt act requirement into a conspiracy provision.

5 But this statute is unique. The money
6 laundering statute is unique. If you look at the statute
7 and we lay it out -- the statute in total -- in our reply
8 brief, starting at 1a -- the structure of 1956 strongly
9 supports our position that all Congress was doing, when
10 they enacted 1956(h), was increasing the penalty for money
11 laundering conspiracies. As this Court is well aware,
12 when Congress typically writes a complex statute, the
13 statute begins by setting forth all of the offense
14 elements. Here, that would be set forth in (a)(1),
15 (a)(2), and (a)(3). The statute then goes on in
16 subsection (b) to set forth the civil penalty provisions.
17 Subsection (c) then defines the various terms used in the
18 act. Subsection (d) then talks about relationships with
19 other laws. Subsection (e) identifies those Federal
20 agencies that can investigate money laundering offenses.
21 Subsection (f) talks about circumstances under which there
22 would be extraterritorial jurisdiction. Subsection (g)
23 then talks about recording -- reporting requirements, and
24 then you get to subsection (h), which we say, when you
25 read the statute as a whole, clearly intends simply that

1 the penalty for money laundering conspiracies would be
2 increased to the same penalties as those prescribed for
3 the offense provision.

4 JUSTICE SCALIA: Except that there are other
5 statutes that -- that read this way, which we have held to
6 -- to create the conspiracy offense, as well as impose the
7 penalty for it.

8 MS. SAMEK: Your Honor --

9 JUSTICE SCALIA: I mean, it -- it could do that.
10 Any person who conspires to commit any offense defined in
11 this section shall be subject to the same penalties as
12 those prescribed for the offense. And that could be
13 deemed to create the conspiracy offense and prescribe the
14 penalty for it.

15 MS. SAMEK: It could be construed as a
16 freestanding offense provision --

17 JUSTICE SCALIA: And there are other such
18 provisions, aren't there?

19 MS. SAMEK: There are not any of the offense --
20 conspiracy provisions that this Court has interpreted that
21 had the same structural ambiguity as 1956(h).

22 JUSTICE O'CONNOR: Well, Shabani comes pretty
23 close, doesn't it?

24 MS. SAMEK: Shabani is a separate, distinct
25 statute. 846 was a separate, distinct, discrete offense

1 statute.

2 JUSTICE O'CONNOR: -- like this it seems to me
3 contains no express requirement of an overt act, and we've
4 said, indeed, none is required and that at common law it
5 wasn't required.

6 MS. SAMEK: That's true.

7 JUSTICE O'CONNOR: So why would we read it in
8 here?

9 MS. SAMEK: Because text -- as this Court has
10 said on multiple occasions, in order to understand what
11 the words mean in a statute, you have to look at context.
12 So you have to look at where the provision is placed and
13 what Congress meant by that provision and look at the
14 statute as a whole.

15 If anyone -- if we look --

16 JUSTICE STEVENS: Of course, if you look at this
17 statute as a whole, you don't find the overt act
18 requirement in it anywhere, do you?

19 MS. SAMEK: You don't find the overt act
20 explicitly in the statute.

21 JUSTICE STEVENS: And the fact that you
22 described it as a long, detailed statute it seems to me
23 cuts against you.

24 MS. SAMEK: No, because our position is that
25 placing it in subsection (h) evidences that Congress'

1 intent and sole focus when they enacted this was the
2 purpose of increasing the penalty for money laundering.
3 The --

4 JUSTICE SCALIA: Let's get --

5 JUSTICE STEVENS: And they were making it
6 unnecessary to rely on the general conspiracy statute in
7 18-371 or whatever it was.

8 MS. SAMEK: It's our position that they're
9 incorporating the overt act requirement, the act in
10 furtherance requirement, from 371 as evidenced by the
11 legislative history.

12 JUSTICE SCALIA: If that's so -- if that's so,
13 then why does the venue provision which you were just
14 alluding to earlier read, except as provided in paragraph
15 (2), a prosecution for an offense under this section. An
16 offense under this section or section 1957 may be brought
17 in -- and then it says -- (2) a prosecution for an attempt
18 or a conspiracy offense under this section. Not under
19 section 371, but a prosecution for an attempt or a
20 conspiracy offense under this section.

21 MS. SAMEK: And it would be an offense under
22 this section because certainly the jury would need to find
23 that the object of the conspiracy was money laundering.
24 So it would be an offense in that respect.

25 JUSTICE SCALIA: I -- I think that language

1 really cuts very hard against you. A conspiracy offense
2 under this section. It -- it is reading as though that's
3 the section that defines the offense, not just the section
4 that provides the penalty.

5 MS. SAMEK: I can see how you would read it that
6 way, Your Honor, but the offense --

7 JUSTICE SCALIA: Only because I'm a reasonable
8 man.

9 (Laughter.)

10 MS. SAMEK: The offense provisions set forth in
11 1956 are clearly set out and enumerated in subsection
12 (a)(1), (a)(2), and (a)(3).

13 In 1988 -- when the statute was originally
14 enacted, (a)(1) and (a)(2) set forth the offense
15 provisions. When the statute was amended in 1988 and
16 Congress intended to create another offense provision,
17 they set forth (a)(1) -- the third sting provision which
18 is (a)(1)(iii). If Congress intended to create an offense
19 provision when they enacted 1956(h), they would have set
20 it forth as (a)(1)(iv), or alternatively, they would have
21 added or conspires to each of the predecessor offenses.

22 Notably, the offense provision at issue here
23 does not include attempts, which 846 did, and which the
24 overwhelming majority of conspiracy subsections include --
25 attempts are included with offenses. The fact that

1 Congress did not include attempts in this provision again
2 reflects the fact that they were solely focused on 371, a
3 conspiracy offense, and all they were trying to do was
4 increase the penalty.

5 The placement of the --

6 JUSTICE GINSBURG: Then you would expect at
7 least a cross reference to 371 for defining the
8 conspiracy, but there's nothing here.

9 MS. SAMEK: That's true, and it clearly would --
10 it certainly would be clearer had they done so. But if
11 you take the language originally, this provision was
12 proposed by Representative Annunzio to be an amendment to
13 371, and we lay out in our -- in the blue brief at page 12
14 what that amendment would have looked like, virtually
15 identical language to 1956(h).

16 Certainly if you read it in subsection 371 -- if
17 you take the identical language and put it in section 371,
18 there wouldn't be much of an argument, we would submit,
19 that Congress surely intended to include the overt act,
20 act in furtherance language and they were just talking
21 about increasing the penalty for money laundering. That
22 makes our point that you look at the language, and
23 depending on where it's placed in a statute, it can have
24 different meanings.

25 JUSTICE GINSBURG: You have given a few examples

1 of a word may mean different things in different contexts,
2 but you haven't given any example -- and I don't know if
3 there is one -- where the entire string of words is
4 identical in two statutes, both dealing with conspiracies,
5 and you read an overt act requirement into one and not the
6 other. I mean, you have a much harder argument to make
7 when you're talking about an entire provision where the
8 wording is almost identical than when you're talking about
9 one word used in different contexts.

10 MS. SAMEK: That's true, Your Honor, but as this
11 Court said in Shabani, absent contrary indications, the
12 Court will presume that Congress intends to incorporate
13 the common law concept of the terms that it uses. In
14 Shabani, the defendant did not argue any contrary
15 indications. They argued that at common law conspiracy
16 required the commission of an overt act. That is not our
17 position.

18 But our position is that here there are contrary
19 indications, and because the statute is ambiguous based on
20 the placement and structure of 1956(h), you have to look
21 to see if there are other indications. And clearly in the
22 legislative history --

23 JUSTICE STEVENS: Yes, but there's nothing in
24 the text of the statute that's ambiguous, is there?

25 MS. SAMEK: No, but that is not dispositive

1 because the placement the Congress has said -- I mean,
2 this Court has said on multiple occasions that you need to
3 read a statute as a whole, and when you look at the --

4 JUSTICE STEVENS: But if you read it as a whole,
5 you can't find any ambiguity.

6 MS. SAMEK: I think you can find ambiguity, Your
7 Honor.

8 JUSTICE STEVENS: In the text of the statute?

9 MS. SAMEK: In the --

10 JUSTICE STEVENS: Reading the whole text.

11 MS. SAMEK: Reading the whole text of the
12 statute, it looks to me it reads that the offenses are set
13 off -- set forth at the beginning, followed by the civil
14 penalties, then procedural aspects, including this penalty
15 provision for increasing conspiracies.

16 JUSTICE STEVENS: None of which mentions an
17 overt act.

18 MS. SAMEK: No, it doesn't mention an overt act,
19 but --

20 JUSTICE STEVENS: So I don't find anything
21 ambiguous in what you describe.

22 MS. SAMEK: Well, we believe that 1956(h)
23 clearly reflects Congress' intent to solely increase the
24 penalty.

25 JUSTICE STEVENS: Perhaps that's all they

1 thought of, but maybe they did a little more than they
2 thought they were doing.

3 MS. SAMEK: Well, if Congress inadvertently
4 omitted the overt act requirement, this Court has on prior
5 occasions read into congressional silence terms,
6 definitions that Congress may have inadvertently left out.
7 So in United States v. Taylor, for example, the question
8 was whether or not Congress intended to revert back to the
9 common law definition of burglary in the Career Criminals
10 Amendment Act, and in 1984, the Career Criminals Amendment
11 Act had language that talked about a generic burglary,
12 breaking and entering into a dwelling. In 1986, when they
13 amended the act, they removed that language.

14 The question before the Court then came up what
15 does -- you know, what does burglary mean. Congress had
16 omitted those words, but the Court found that that wasn't
17 Congress' intent. They clearly didn't intend to revert
18 back to the common law, and it was probably an error of
19 drafting and this Court found that generic burglary was
20 the standard. So this Court has done that before.

21 In the -- in the Perrin case, United States v.
22 Perrin, the same thing. There -- words were missing from
23 the statute and the Court did not find that in Perrin --
24 it was a bribery case, and what was at issue was whether
25 or not the -- the statute covered bribery of private

1 persons or only the common law definition where it would
2 only incorporate bribery of public -- public persons,
3 public officials. And the Court said even though there
4 are other statutes that have private person language in
5 it, similar to this case, even though there are other
6 statutes that have overt act requirements in it, we are
7 not going to assume that Congress intended to revert back
8 to the common law and interpret bribery as only applying
9 to public officials.

10 So this Court can look at the legislative
11 history. The purpose is clear. The Government admits
12 that the purpose of the act was to increase the penalty.
13 Prior to 1956(h), money laundering conspiracies were
14 prosecuted pursuant to 371, which required the commission
15 of an overt act. Congress clearly intended to increase
16 the penalty from 5 years to a potential 10 or 20 years,
17 based on what the object of the conspiracy was. The
18 legislative history all reflects that fact, and the
19 Government admits that.

20 The -- as contrasted with 846, which -- in which
21 the public law described 846 in a section labeled offenses
22 and provision in the money laundering context, the public
23 law described 1956(h) as a penalty to increase the -- as a
24 money laundering conspiracy for increasing the penalty.

25 JUSTICE SCALIA: Can I -- can I ask what you

1 make of subsection (d) of -- of this provision which says
2 that violations of this section may be investigated by
3 such components of the Department of Justice as the
4 Attorney General may direct and by such components of the
5 Department of the Treasury as the Secretary of the
6 Treasury may direct, as appropriate, and with respect to
7 offenses over which the Postal Service has jurisdiction,
8 by the Postal Service?

9 Apparently there was some turf war going on as
10 to who had jurisdiction over these offenses and -- and
11 this was meant to -- to solve the turf war, but it reads
12 violations of this section.

13 Now, does that allocation of authority among
14 Justice and Treasury and the Postal Service not apply to
15 the conspiracy offenses under section 371? Because that's
16 not a violation of this section.

17 MS. SAMEK: I'm not sure I understand your
18 point. I would think that if it's a conspiracy to commit
19 -- if the specified unlawful activity is one of the postal
20 offenses or one of the customs offenses, both of which
21 carry --

22 JUSTICE SCALIA: The offense is never completed.
23 there's nothing -- nothing occurs except a conspiracy, and
24 you're telling us a conspiracy is not a violation of this
25 section. This section sets forth the penalty -- that's

1 your argument -- but it does not establish the offense.
2 The offense is established by 371. If that's the case,
3 this allocation of responsibility among the various
4 divisions of the Government doesn't apply to conspiracy
5 prosecutions, which would make no sense at all.

6 MS. SAMEK: It's our position that when Congress
7 enacted this, they were trying to enact a penalty-
8 enhancing statute. 1956(h) then incorporates or impliedly
9 recognizes the overt act requirement from 371. Congress
10 was not intending to change the way money laundering
11 conspiracies were prosecuted. They would have done so
12 under 371, requiring the act in furtherance, and a jury or
13 a judge would find that money laundering was the object of
14 the conspiracy. That's how Congress envisioned this act
15 as -- as being applied, and so I would assume Congress
16 would envision that if it was a conspiracy to violate one
17 of the postal offenses, that the postal authority would
18 have had authority to investigate that offense.

19 Interesting --

20 JUSTICE SOUTER: What do you -- excuse me. What
21 -- what do you make of -- of this argument? Let's start
22 with the premise that Congress wasn't thinking about overt
23 acts at all. Start with the premise that you argue from
24 that what Congress was concerned with here was primarily
25 penalty. However, Congress did this in a context in which

1 there are two recognized kinds of statutes, two recognized
2 kinds of -- of conspiracy formulations. And if one has
3 the magic words in it referring to an overt act, you got
4 to prove an overt act. In the other variety, there's no
5 reference to overt acts, and as a general rule, you don't
6 have to prove overt acts.

7 Why isn't it a sensible interpretive rule to
8 say, look, when there are recognized models and Congress,
9 in fact, chooses one rather than another, we're not going
10 to get into the question of did Congress really mean to
11 make a change when it picked one model rather than the
12 other? It simply picked one model, and the -- the
13 clearest way to have a coherent system of conspiracy law
14 is to apply the model. If it didn't talk about overt act,
15 there's no overt act requirement. Why isn't that a
16 sensible way to -- to work our way through these thickets?

17 MS. SAMEK: I -- I think that would be a
18 sensible way to work your way through thickets of statutes
19 that were enacted after Shabani when this Court created
20 that formulary.

21 JUSTICE SOUTER: But Shabani rested on -- on the
22 existence of these prior models. Shabani didn't create
23 them.

24 MS. SAMEK: That's correct, but there is nothing
25 in the legislative history to suggest that Nash and

1 Singer, the cases that Shabani relied on, were ever
2 discussed or contemplated by Congress. If Congress was
3 going to make such a fundamental change in how they were
4 going to prosecute money laundering conspiracies, they
5 would have said so. We're not talking about a backdrop of
6 not requiring an overt act and should Congress read an
7 overt act into Congress' silence.

8 JUSTICE GINSBURG: There are about -- there are
9 over 50, I think, in title 18 alone conspiracy provisions
10 with no overt act requirement, no explicit overt act
11 requirement. The -- the argument you're making, I
12 suppose, would require this Court to go by -- one by one
13 through those 50-odd statutes, and there would be contests
14 of every one because the absence of those words is not
15 dispositive, as you see it. So you would be generating a
16 controversy about 50-odd statutes that would be gone, that
17 just wouldn't be there if you agreed with Justice Souter's
18 approach.

19 MS. SAMEK: Well, we don't -- we don't believe
20 that's the case because if you look at all of those
21 subsections in title 18, none of them have the structural
22 ambiguity that 1956(h) has, combined with a venue
23 provision --

24 JUSTICE GINSBURG: Have you looked at all 59, I
25 think --

1 MS. SAMEK: The --

2 JUSTICE GINSBURG: -- and assured yourself on
3 that?

4 MS. SAMEK: I've -- I've looked through the
5 entire statute, and I have not found -- title 18. I have
6 not found any that have both an anomaly, a structural
7 anomaly, and a venue provision that turns on the existence
8 of an overt act.

9 JUSTICE GINSBURG: Well, we've already dealt
10 with venue where I think your argument is exceedingly weak
11 since the statute phrases it as a permissive not a
12 requirement.

13 MS. SAMEK: Well, first of all, we would submit,
14 just briefly on -- on the venue point, if Congress wanted
15 this to be a permissive venue provision, they could have
16 said venue would lie where and in the circumstances or as
17 otherwise required by statute, in which case they could
18 have shown that they were applying to other statutory
19 bases for venue, as well as what Congress was establishing
20 here. They didn't do that.

21 The venue provision was enacted in response to
22 this Court's decision in Cabrales, which dealt with the
23 money laundering -- the substantive offense of money
24 laundering, and this Court's suggestion that money
25 laundering could be considered a continuing violation for

1 purposes of 18 U.S.C. 3237, the continuing offense venue
2 provision. If all Congress was doing was codifying that
3 principle and trying to address the issue in Cabrales,
4 they would have just dealt with substantive money
5 laundering in the venue provision. They would not have
6 also included a provision in the venue section dealing
7 with conspiracy. The fact that they did and the fact that
8 they used language that this Court has previously found
9 to --

10 JUSTICE GINSBURG: It gave -- it gave the
11 prosecutor more choices of where to bring suit.

12 MS. SAMEK: We say those are the only choices on
13 where to bring suit. But --

14 JUSTICE STEVENS: Do you want to reserve any
15 time?

16 MS. SAMEK: Oh, yes. I'm sorry.

17 JUSTICE STEVENS: Mr. Marcus.

18 ORAL ARGUMENT OF JONATHAN L. MARCUS

19 ON BEHALF OF THE RESPONDENT

20 MR. MARCUS: Justice Stevens, and may it please
21 the Court:

22 The money laundering conspiracy statute does not
23 require proof of an overt act for three reasons. First,
24 the text of the statute contains no such requirement.
25 Second, the statute is modeled on the drug conspiracy

1 statute which this Court unanimously held in the Shabani
2 case does not require proof of an overt act. Third, the
3 statute was enacted against the background rule of
4 statutory construction that -- that a conspiracy
5 provision, whose text conditions liability on the act of
6 conspiring only, will be construed to follow the common
7 law, where proof of an overt act was not required for
8 conviction.

9 This Court should adhere to its bright line rule
10 in this case because it provides clear guidance to
11 Congress and to the lower courts.

12 Petitioners seek to avoid application of the
13 bright line rule on a variety of grounds, none of which
14 has -- none of which has merit. I will address a few of
15 those grounds here.

16 First, the money laundering conspiracy statute,
17 section 1956(h), is not a penalty provision for the
18 general conspiracy statute, section 371. Section 1956(h)
19 does not contain any reference to section 371, and
20 petitioners are unable to cite any provision in the United
21 States Code that provides a penalty for an offense defined
22 elsewhere, without also referencing where that offense is
23 defined. Under petitioners' theory, if section 371 were
24 appealed tomorrow, section 1956(h) would also no longer be
25 valid. But there is --

1 JUSTICE SOUTER: If -- if 371 were repealed,
2 would it affect the actual practice in the Justice
3 Department? I -- I think I recall reading in the briefs
4 for the other side that -- that the -- the United States
5 has continued to charge conspiracies in money laundering
6 cases under 371. Is that correct?

7 MR. MARCUS: Well, my understanding is on -- on
8 occasion that is done in a multi-object conspiracy case.
9 Where there are several objects to the conspiracy
10 sometimes for purpose of simplification, the Government
11 will just -- will charge a 371 --

12 JUSTICE SOUTER: But not in exclusively
13 laundering cases.

14 MR. MARCUS: Generally, no. There might be --
15 there might be an occasional example where it may have
16 been an oversight where a prosecutor may have overlooked
17 section 1956(h), maybe soon after 1956(h) was enacted, but
18 generally speaking no. The money laundering conspiracy
19 prosecutions are done under 1956(h).

20 JUSTICE SCALIA: When -- when you say when there
21 are multiple objects, you're not getting the money --
22 money laundering just under 371. You'd surely charge both
23 under 371 and under -- under -- what is it? 1956.

24 MR. MARCUS: That's correct, Justice Scalia.
25 You could. You could prosecute -- you could prosecute

1 them as -- as separate offenses, but sometimes the
2 Government for -- just for purpose of simplification will
3 just charge one -- one agreement with multiple objects,
4 and one of those objects might be a money laundering
5 object.

6 JUSTICE KENNEDY: If it were just money
7 laundering, could you charge under 371?

8 MR. MARCUS: Yes, you could charge under 371.
9 There's nothing that prevents the Government from doing
10 so. This Court has -- has held before, for example, in
11 the Batchelder case that there can be multiple provisions
12 that essentially cover the same conduct, and the
13 Government has discretion to choose which one to use.
14 Generally speaking, the money laundering conspiracy
15 statute contains higher penalties. So the practice today
16 is -- is to prosecute those offenses under section
17 1956(h).

18 Another -- another reading there -- another
19 reason they're reading that it's a penalty provision
20 should be rejected is that Congress modeled section
21 1956(h) on the drug conspiracy statute that's virtually
22 identically worded to section 1956(h), and no one disputes
23 that the drug conspiracy statute establishes a
24 freestanding criminal offense.

25 JUSTICE SCALIA: This is 846.

1 MR. MARCUS: 846, yes, in title 21.

2 Petitioners also argue that because prior to
3 enactment of section 1956(h), the Government had to
4 prosecute money laundering conspiracies for 6 years under
5 section 371, that this Court should presume that Congress
6 intended to perpetuate the overt act requirement of
7 section 371 into the money laundering conspiracy offense.

8 But this Court looks, first, to the text of the
9 statute to discern Congress' intent, and had Congress
10 wanted to perpetuate section 371's overt act requirement,
11 it could have easily modeled the text of section 1956(h)
12 on the language from 371 or on the language from any of
13 the other numerous conspiracy provisions in the code that
14 contained express overt act requirements.

15 Congress chose a different model, the drug
16 conspiracy statute, which as I said before, this Court
17 held in *Shabani* does not contain an overt act requirement.
18 By choosing that model, Congress manifested its intent not
19 to require proof of an overt act because at the time it --
20 because at the time it acted, the background rule of
21 statutory construction provided that a conspiracy statute
22 that conditions liability solely on the act of conspiring
23 would be construed to follow the common law.

24 Petitioners point to silence in the legislative
25 history, but the silence in the legislative history on the

1 overt act requirement is not the kind of compelling
2 evidence of -- of contrary intent that would justify
3 departing from the text of the statute and this Court's
4 bright line rule.

5 Finally, petitioners rely on a venue provision
6 for money laundering cases, section 1956(i), which was
7 enacted 9 years after the money laundering conspiracy
8 statute at issue here. That venue provision reflects
9 Congress' intent to identify a variety of districts in
10 which money laundering cases can be brought. It does not
11 reflect an intent to redefine the -- the elements of the
12 substantive money laundering conspiracy offense.

13 JUSTICE SOUTER: What do you make of the -- the
14 argument that I think occurs in the yellow brief, that --
15 the reference to any other district where an act in
16 furtherance, et cetera, took place implies that in the
17 clause preceding, they were referring to a district in
18 which an act in furtherance took place?

19 MR. MARCUS: Justice Souter, I think what --
20 what that terminology was -- was referring to was
21 district. The other is meant to modify district. In
22 other words, the first -- the first clause there provides
23 a venue where the case can be brought. And if it's not
24 brought in that -- if it doesn't fall within that venue,
25 then you can bring it in -- in a different district, an

1 other district. I think that's the -- the best way to
2 read the -- the statute. I mean, otherwise, it could have
3 -- as it was pointed out during petitioners' argument,
4 otherwise they could have just had one. They wouldn't
5 need separate clauses. They could have just had one
6 clause that said, and the case -- the conspiracy case can
7 be brought in any district where an overt act was
8 committed.

9 Petitioners seize on the fact that the venue
10 provision permits venue to be laid in any district in
11 which an overt act was committed. But the rule in
12 conspiracy cases has always been that an overt -- that
13 venue can be laid where an overt act was committed
14 regardless of whether an overt act was an element of the
15 offense. At common law, as I said before, conspiracies --
16 a conspiracy conviction did not rely -- depend on proof of
17 an overt act, and yet venue could always be laid at common
18 law where an overt act was committed.

19 The common law venue rule has been applied
20 consistently to modern Federal conspiracy statutes, such
21 as the drug conspiracy statute, which likewise does not
22 require proof of an overt act as an element of the
23 offense.

24 Congress' codification in the money laundering
25 statute of -- of this -- of this venue principle cannot be

1 read to presuppose an overt act element when the very
2 venue rule it was codifying did not presuppose one.

3 If this Court -- if this Court has no further
4 questions --

5 JUSTICE STEVENS: I had just one other question,
6 just out of curiosity, about how important this case is.
7 How many prosecutions under this statute does the
8 Government bring without proving an overt act?

9 MR. MARCUS: I'm -- I'm not aware of -- I'm not
10 aware of a number, Justice Stevens.

11 JUSTICE STEVENS: Are there any?

12 MR. MARCUS: I -- I don't know. I mean, it's --

13 JUSTICE STEVENS: It seems to me quite unlikely.

14 MR. MARCUS: Well --

15 JUSTICE STEVENS: I'm just wondering. It seems
16 to me sort of a tempest in a teapot, this whole case to
17 me.

18 MR. MARCUS: Yes. I think it's true in the vast
19 majority of cases, the Government does have proof of an
20 overt act. And, of course, overt acts help establish the
21 -- establish the agreement and -- and to convince the jury
22 beyond a reasonable doubt there was an agreement.

23 If the Court has no further questions --

24 JUSTICE GINSBURG: I -- I do have one and it's
25 not on the money laundering conspiracy issue, but in this

1 particular case, would it be consistent with the position
2 that the Solicitor General has been taking for us to hold
3 the final disposition of this case pending Booker and
4 Fanfan? Wasn't there a sentencing question?

5 MR. MARCUS: Well, it's our position that it
6 wasn't -- they didn't raise that issue in -- in the court
7 of appeals. They didn't raise the Sixth Amendment issue
8 in the court of appeals. They didn't raise that issue in
9 their cert petition here, and so it's -- it's not covered
10 by the -- by the question presented. So it is the
11 position that we've -- that we've set out in the brief
12 that it should not be -- it should not be held pending
13 that -- that disposition in Booker and Fanfan.

14 JUSTICE GINSBURG: And that's consistent with
15 the position that the Government has been taking routinely
16 in cases where Booker -- where the sentencing guidelines
17 are an issue?

18 MR. MARCUS: Well, I think in the -- I think
19 that that position is based on petitions that have raised
20 the question, I believe.

21 If -- if the Court has no further questions, it
22 should reaffirm the conspiracy statutes that do not
23 contain an overt act requirement should not be read to
24 include one. Thank you.

25 JUSTICE STEVENS: Thank you, Mr. Marcus.

1 Ms. Samek, you have about 3 and a half minutes
2 left.

3 REBUTTAL ARGUMENT OF SHARON C. SAMEK

4 ON BEHALF OF THE PETITIONERS

5 MS. SAMEK: Mr. Chief Justice, and may it please
6 the Court:

7 Justice Ginsburg, you had inquired about the
8 number of subsection -- conspiracy subsections, and I
9 didn't get a chance to answer your question. Even if you
10 don't find the statute is unique because of the venue
11 provision, as my review of the conspiracy subsections in
12 title 18, there were only about two others out of the 50-
13 some-odd cases that have the same structural anomaly that
14 1956(h) does. So this would not be opening up a can of
15 worms to say that in this case an overt act clearly was
16 intended by Congress and that we need to look at
17 congressional intent. So it wouldn't be -- require -- a
18 holding in this case consistent with congressional purpose
19 would not require the Court to then have to review every
20 single title 18 conspiracy subsection.

21 As the Government pointed out, money laundering
22 cases are not typically prosecuted without the commission
23 of an overt act because overt acts are relatively simple
24 to prove. There's no reason why Congress would have
25 intentionally eliminated the overt act requirement from

1 money laundering conspiracies when, on the one hand, it's
2 easy to prove, but on the other hand, it placed such a
3 critical value in money laundering conspiracies because
4 it's not just that it shows that criminal intent has
5 crystallized and that money laundering is actually afoot,
6 but you're talking about taking offenses, like we say in
7 our brief, where someone pledges a -- a cow for collateral
8 for a loan and then they talk with a friend about whether
9 or not they should sell the cow, and they decide not to
10 sell the cow. Under the Government's theory, they
11 couldn't be prosecuted for defrauding the Government
12 because, in fact, they never sold the cow. They couldn't
13 be prosecuted for conspiracy to defraud the Government
14 because they didn't commit an overt act in furtherance of
15 defrauding the Government. They couldn't be convicted or
16 prosecuted for money laundering because they never sold
17 the cow, so there were never any proceeds to generate.
18 But they could be convicted, under the Government's
19 theory, of conspiracy to commit money laundering based on
20 the sale of a cow and their sentence would increase from a
21 potential 5 years to a potential 20 years. There's
22 absolutely no indication in the Congressional Record that
23 Congress ever intended such dramatic triggering of
24 substantially higher penalties without the commission of
25 an overt act, which is not difficult to prove.

1 JUSTICE GINSBURG: The Government has said that
2 -- that you have essentially waived their sentencing
3 guidelines issue that you asked us in footnote 6 of your
4 brief to consider.

5 MS. SAMEK: In the district court, there were
6 issues raised as to all defendants as far as various
7 sentencing enhancements. In front of the Eleventh
8 Circuit, one of those enhancements was argued and it was
9 rejected. As to Mr. Hall, one of the sentencing
10 enhancements were argued and was reversed on that
11 sentencing enhancement. But there is still a sentencing
12 enhancement that was raised in the Eleventh Circuit, but
13 it was not raised in this petition. It was not the issue
14 that this Court granted cert on, but we would argue that
15 it's still a valid -- a valid claim and that this Court
16 should hold this decision in abeyance until its decision
17 in Booker and Fanfan.

18 JUSTICE SCALIA: Was the argument below that --
19 -- that imposing the sentencing enhancement was
20 unconstitutional, or was the argument just that the facts
21 didn't support it?

22 MS. SAMEK: The argument was that the facts
23 didn't support it.

24 Finally, Your Honor, we would -- Your Honors, we
25 would just again say that Congress did not intend to cause

1 a dramatic change in the way money laundering conspiracies
2 were prosecuted. This Court has said in other cases that
3 when Congress intends dramatic changes, that you would
4 expect to find something in the legislative history. The
5 Court has said that in the Lewis case having to do with
6 interstate gambling and -- I see my time is up. Thank
7 you.

8 JUSTICE STEVENS: Thank you very much.

9 The case is submitted.

10 (Whereupon, at 10:49 a.m., the case in the
11 above-entitled matter was submitted.)
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